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# PRESUMING LAWYERS COMPETENT TO PROTECT FUNDAMENTAL RIGHTS: IS IT AN AFFORDABLE FICTION?

BY ROBERT G. LAWSON\*

## INTRODUCTION

For use in another part of this publication I recently attempted to describe the important cases about evidence law decided by Kentucky courts during the last year or so. In order to identify the important ones it was necessary to review every case decided during the period in question that had any evidentiary implication at all. Needless to say, there were many. While performing this task, which was frankly uninspiring at times, I found myself distracted by some thoughts expressed recently in a case decided by the Supreme Court of the United States. The case is *Wainwright v. Sykes*;<sup>1</sup> the thoughts are those of Justice Brennan.

The broad question before the Court in *Sykes* concerned the extent to which state prisoners should have access to federal court by use of the writ of habeas corpus. The narrow issue before the Court concerned the impact on a prisoner's claim for habeas relief of procedural defaults (such as a failure to object to evidence, a failure to perfect an appeal, etc.) that occur in the state proceeding under attack.<sup>2</sup> In considering these important issues Justice Brennan made one observation that hardly any lawyer could dispute: "There is nothing unreasonable . . . in adhering to the proposition that it is the responsibility of a trial lawyer who takes on the defense of another to be aware of his client's basic legal rights and of the legitimate rules of the

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<sup>1</sup> 433 U.S. 72 (1977).

<sup>2</sup> The decision in *Sykes* is only indirectly significant to the discussion that follows, but perhaps it would be worthwhile to set it forth. The Supreme Court ruled in the case that procedural defaults (such as failure to object to the admissibility of a confession, as occurred in *Sykes*) will bar federal habeas review absent a showing by the petitioner of "cause" and "prejudice." With the adoption of this rule, the Supreme Court rejected the pre-existing principle that such defaults would bar habeas relief only upon a showing that the defendant had "deliberately bypassed" orderly state procedures under which he could have presented his constitutional claim.

forum in which he practices his profession.”<sup>3</sup> In addition Justice Brennan expressed a thought that is certain to generate disagreement, as evidenced by the fact that it captures the essence of his dissent to the majority’s decision in the case. He said that “any realistic system of federal habeas corpus jurisdiction must be premised on the reality that the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel.”<sup>4</sup>

As a result of the distraction caused by these thoughts of Justice Brennan, I emerged from my effort to review developments in evidence law with an impression about the decision-making processes of the state, an impression that belittles the combined importance of the evidence decisions identified through that effort. The impression of which I speak does not involve “a review of significant development in the law”; instead, it involves in a broad sense the quality of justice being provided in this state in criminal cases. A description of the impression in this publication—which is characterized as a survey of law developments—might be regarded as inappropriate, extraneous, and off-the-point. On the other hand the impression is not based on the decision-making processes of New York, or California, or Texas, but rather on those of this state; and, it seems important enough to be set forth in a writing that will attract as much attention as possible from this state’s judges and lawyers. This survey satisfies that prerequisite better than any other publication; so, I have chosen to use it to describe some disturbing indications about the manner in which individual rights of a fundamental nature are being protected in our courts.<sup>5</sup>

## I. THE IMPRESSION

### 1.

In 1975 a brutal murder occurred in a county located in this state. Indictments were returned against three individuals, and two trials were held. In the first the jury was unable to reach a verdict, indicating the possibility that guilt of the

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<sup>3</sup> 433 U.S. at 117-18 (dissenting opinion).

<sup>4</sup> *Id.* at 104.

<sup>5</sup> Most of the cases discussed in this article are not identified by name or citation.

charged individuals was less than certain. In the second trial, one of the three defendants was convicted and sentenced to a prison term of twenty years and a day. This defendant appealed to the Supreme Court of Kentucky, and presented to the Court four grounds for reversal of his conviction. The disposition of his arguments was as follows: (1) In the second trial of this case the jury had not been instructed that a criminal conviction cannot be based exclusively on the testimony of an accomplice. The defendant argued on appeal that he was entitled to such an instruction. Although disagreeing with him on the merits of this argument, the Supreme Court ruled that the defendant had in any event not preserved the question for review, since his lawyer had failed to request the desired instruction at trial. (2) The defendant urged the Supreme Court to reverse his conviction on the ground that it was not supported by sufficient evidence. The Court ruled that the defendant had failed to preserve any error which might have occurred in this regard, since his lawyer had neglected to move for a directed verdict of acquittal. (3) The defendant argued on appeal that error was committed at his trial when the court failed to instruct the jury on lesser degrees of the offense of homicide. The Supreme Court ruled that any error which might have occurred in this regard was waived by failure of the defendant's lawyer to request such instructions, as required explicitly by the Rules of Criminal Procedure. (4) Finally, the defendant argued to the Court that the instruction given the jury on the offense of murder was erroneous because it provided alternative methods for finding guilt, without indicating that the jury had to reach a unanimous decision under one or the other of the alternatives. The Supreme Court said, "[I]t is obvious that the alternative instruction [was] erroneous," but it also said, and ruled accordingly, that the defendant had failed to preserve the error by objecting at trial, as required by the Rules of Criminal Procedure.

Under the law of this state the defendant possessed in this situation a right to have his conviction reviewed on appeal. In this most serious of legal controversies his right evaporated, in effect, because of the manner in which the case was handled at trial. A final statement by the Supreme Court removes all doubt from this conclusion:

[T]his court notes that all of [the defendant's] points deal either with error in the instructions or insufficiency of the evidence. This court on many occasions has determined that to preserve such points for consideration on appeal, the defendant must either offer an instruction which he contends should have been used, or move for a directed verdict. [The defendant] failed to do either. Because [he] failed to preserve such points, this court will not consider them since they are raised for the first time in this appeal.

As Justice Brennan said, "[I]t is the responsibility of a trial lawyer who takes on the defense of another to be aware . . . of the legitimate rules of the forum in which he practices his profession."<sup>6</sup> More importantly, it is the responsibility of lawyers as a group to see that the processes of the law function properly and effectively. Is it unreasonable to entertain the thought that perhaps these responsibilities were not satisfied in this case? Is it unreasonable to wonder whether this man's liberty received adequate protection under processes which we as lawyers collectively manage and control? Is it unreasonable to question whether the people who have entrusted us with this responsibility would find acceptable the manner in which the controversy between the state and this individual was processed?

## 2.

At some point within the last couple of years two men robbed a bar in one of the cities of this state. As a consequence, a charge of robbery and an additional charge under the persistent felony offender statute were lodged against an individual. Following a trial on the charges the defendant was convicted under the persistent felony offender statute and sentenced to life imprisonment. He appealed to the Supreme Court, asserting four grounds for reversal of his conviction. One of his assertions was decided against him on the merits. The other three were resolved as follows: (1) He argued to the Supreme Court that certain cross-examination by the prosecutor had been improperly authorized by the trial court. The Court said, "[N]o objections were made to the questions, thus the issue

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<sup>6</sup> 433 U.S. at 118.

is not preserved for appellate review." (2) He complained on appeal about three portions of the prosecutor's summation to the jury. With respect to this complaint the Supreme Court stated:

There was no objection on two of the statements, so we will not consider them as error. We do observe that these portions of the argument are pointless, not appropriate to the facts adduced in the trial of the case and cause us to wonder why the Commonwealth's attorney would flirt with reversal when he had a strong case for the jury without engaging in pointless histrionics.

(3) The defendant finally argued that his conviction should be reversed because the Commonwealth had failed to prove that he was a persistent felony offender. In this regard he correctly asserted that the Kentucky Penal Code requires, for a conviction of this type, proof that the defendant committed three felony offenses after attaining the age of eighteen years. In responding to this assertion the Supreme Court said:

[T]he Commonwealth . . . failed to introduce evidence to prove the date of the commission of the first offense in order to satisfy the requirement of KRS 532.080 (2)(b) that the offender was over the age of eighteen when the offenses were committed. This plain failure of the Commonwealth to prove a case under the persistent felony offender statute was not preserved for appellate review. [The defendant] did not move for a directed verdict at the close of the evidence; thus, he waived the insufficiency of the evidence by his failure to ask for a peremptory instruction.

Should we be alarmed or concerned about the manner in which justice was administered in this instance? It seems to me that we must at least acknowledge one undeniable truth about the case. The individual charged with the offense received a life sentence despite the fact that there was, to use the words of the Court, a "plain failure" by the state to prove the charges. It is true that the defendant might nevertheless have been a persistent felony offender; if so, he deserved the sentence imposed on him by the law. But we must surely ask ourselves: Can we be satisfied with saying that a criminal defendant is probably guilty and that he probably deserves to lose his freedom? Have the fundamental rights of an individual been adequately protected when the end result of the legal process through which

he traveled is a conclusion that he "might nevertheless have been" guilty?

## II. THE PERVASIVENESS OF THE PROBLEM

Although the two cases described above are somewhat extreme in degree, the condition which they portray is seemingly widespread in the trial of criminal cases. Frequent reference to the types of inadequacy illustrated by these cases can be found in the opinions of the appellate courts of the state. The following one, from an opinion written by Justice Palmore of the Supreme Court, is representative:

In the argument of this and other recent criminal appeals we detect what appears to be a failure to appreciate the importance of and necessity for procedural regularity in the conduct of trials. Substantive rights, even of constitutional magnitude, do not transcend procedural rules, because without such rules those rights would smother in chaos and could not survive.<sup>7</sup>

The pervasiveness of the problem to which Justice Palmore makes reference, and about which I write, can be fully appreciated only after a complete review of all criminal appeals decided over a fixed and fairly extended period of time. However, the basis for a general impression about the nature of the problem can be provided through a description of two phenomena which are exposed to view in the appellate process.

The multiformity of errors or neglect that materialize in this process is the first indicative phenomenon. Listed below are the kinds of failures that would be discovered in cases decided by the Supreme Court and the Court of Appeals during a period of approximately one year, if those cases were reviewed by one interested *only* in evidence law. The list is not intended to be exhaustive; nonetheless, it would be more than a little difficult to think of many that are not listed:

1. A failure to object to incompetent evidence.
2. A failure to request an admonition to the jury to give evidence a restricted use, *e.g.*, to use prior felony convictions only for purposes of impeachment.

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<sup>7</sup> Brown v. Commonwealth, 551 S.W.2d 557, 559 (Ky. 1977).

3. A failure to request an admonition to the jury that evidence competent only against a co-defendant be restricted in its use to that party.
4. A failure to object to a prosecutor's use of information that has not been introduced into evidence.
5. A failure to make an avowal, or to take other steps, to include in the record evidence ruled inadmissible by the trial court.
6. A failure to object to the lack of competency of a youthful or other witness.
7. A failure to object to the admissibility of a confession of a co-defendant.
8. A failure to obtain at trial a determination of whether a defendant was warned of his constitutional rights before giving a confession.
9. A failure to determine at trial if the warnings given a defendant in a confession situation were adequate.
10. A failure to demand a "Cotton" hearing<sup>8</sup> to determine if impeachment of a defendant by use of prior felony convictions would be appropriate.
11. A failure to object to the use of evidence about unrelated criminal activity of a defendant.
12. A failure to request an evidentiary hearing to determine if an in-court identification is tainted by an unconstitutional out-of-court identification.
13. A failure to move for a directed verdict, so as to challenge the sufficiency of the state's evidence.
14. A failure to renew a motion for a directed verdict at the close of all the evidence.
15. A failure to object to instructions submitted to the jury.
16. A failure to tender instructions that would present for jury consideration defenses upon which a defendant wishes to rely.
17. A failure to request instructions on lesser included offenses.
18. A failure to object to improper summation by the prosecution.
19. A failure to ask for an admonition to the jury to have improper summation disregarded.
20. A failure to object to a misstatement of law by the prosecutor in summation.

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<sup>8</sup> See *Cotton v. Commonwealth*, 454 S.W.2d 698 (Ky. 1970).



21. A failure to move for a mistrial when prejudicial evidence has been admitted or when prejudicial argument has been made.

22. A failure to request an admonition to protect against a conviction on the sole basis of accomplice testimony.

23. A failure to challenge an inadequate indictment prior to trial, as required explicitly by the Rules of Criminal Procedure.

24. A failure to challenge at trial the constitutionality of a criminal statute.

25. A failure to object to procedures used at trial to select a jury.

26. A failure to support motions for relief with specific reasons and grounds.

27. A failure to compel the trial court to rule on motions or objections.

28. A failure to file with the record on appeal a transcript of the evidence.

The diversity of mistakes indicated in this list would seem at least to minimize doubt about the existence of a weakness in our efforts to administer criminal justice. The magnitude of that weakness is perhaps better portrayed by a second phenomenon which surfaces in the appellate process—namely, the frequency with which a significant part of a criminal appeal is resolved on some basis other than its merits. Surely, a level of performance and competence by lawyers that would fail to assure that a controversy between an individual and the state will be resolved on its merits would be deemed unacceptable. The following cases, which are additional to the “extreme” ones described above, seem to create doubt that the quality of our performance warrants such an assurance:

*Case No. 1:* In this case the defendant was convicted of robbery in the first degree and sentenced to twenty years imprisonment. He appealed on the exclusive ground that the trial court had failed to instruct the jury on his theory of the case, as is required by law. The record on appeal showed that no objection had been made to the trial court’s proposed instructions and that no additional instructions had been tendered to the court by the defendant’s lawyer. The Supreme Court ruled that no question had been preserved for review, and none was reviewed.

*Case No. 2:* In this case the defendant was also convicted

of robbery in the first degree and sentenced to twenty years imprisonment. On appeal he made two arguments. One was that improper instructions had been given the jury by the trial judge; the other was that the prosecutor had been permitted to impeach defense witnesses without complying with established rules for impeachment. The Supreme Court reached neither issue on the merits, for no objection had been made by the defendant's lawyer to the instructions and no objection had been made to the impeachment of defense witnesses.

*Case No. 3:* The defendant in this case, following a conviction for robbery in the first degree, appealed to the Court of Appeals. His primary claim for reversal of the conviction was based on allegations of error surrounding an in-court identification of him as the robber. The record on appeal showed (1) that one of the principal identification witnesses had been unable to identify the defendant at a preliminary hearing; (2) that this witness had been shown a photograph of the defendant on the day of trial; (3) that objection was made to this witness' in-court identification because of the pre-trial use of the photograph; and (4) that the trial court had failed to hold an out-of-court hearing to determine if the witness' identification was free of illegal taint and therefore properly admissible. The Court of Appeals stated that such a hearing was required by established constitutional doctrine and should have been held. However, the Court ruled that no reversible error was committed by this failure, since the defendant's lawyer had neglected to request the hearing. On this appeal the defendant also argued that reversible error had been committed when the prosecutor was allowed to impeach his credibility by use of a prior felony conviction in the absence of a required out-of-court hearing to determine the appropriateness of such impeachment. The Court of Appeals ruled that this requirement was also waived by a failure of the defendant's lawyer to request the hearing.

*Case No. 4:* The defendant in this case was convicted of armed robbery. He urged the Supreme Court to reverse his conviction on two grounds: (1) that while the evidence against him might support a conviction of robbery it was insufficient to support a conviction of armed robbery; and (2) that the trial court had erroneously excluded testimony offered by the defendant from a co-indictee. Neither of his appellate arguments

was resolved on its merits. The first was rejected because the defendant's lawyer had moved at trial for a directed verdict of acquittal, when he should have objected to the submission of an instruction on armed robbery; the second was rejected because the defendant's lawyer had failed to include in the record the testimony that would have been given, had the co-indictee been permitted to testify.

*Case No. 5:* In this case the defendant was convicted of two counts of kidnapping and sentenced to ten years imprisonment on each. On his appeal to the Supreme Court he made two arguments. One was that the prosecutor had been permitted to cross-examine him about a prior felony conviction without complying with the requirement of an in-camera hearing to determine admissibility. The Supreme Court did not consider the merits of this argument because of a failure by the defendant to identify the type of felony involved in the cross-examination so that the Court could know whether impeachment would have been improper, had a hearing been held. The second argument was that the trial court had erred in refusing a request for change of venue. The Supreme Court rejected this argument because the affidavits presented in support of the motion for change of venue contained no specific information upon which a trial court could make a decision on the request.

*Case No. 6:* In this case the defendant was convicted of murder and sentenced to twenty years imprisonment. He argued on appeal that a murder instruction was not warranted by the evidence in the case; the Supreme Court declined to consider the argument since no objection had been made at trial to the submission of a murder instruction. He also argued that the jury had been incorrectly instructed as to the nature of the defense of self-protection; this argument was not considered on the merits since no objection had been made at trial to the self-defense instruction. The defendant argued in addition that a confession entered into evidence had been taken without adequate "Miranda" warnings; the Supreme Court ruled that the sufficiency of such warnings had not been raised at trial and thus could not be considered on appeal. Two other arguments made by the defendant in this case were resolved on the merits.

*Case No. 7:* In this case the defendant was convicted of felonious escape. He appealed on the exclusive ground that the

jury had not been instructed with respect to the affirmative defense of coercion. The Supreme Court refused to consider the merits of his appeal because the defendant's lawyer offered no such instruction at trial nor objected to the instructions that were given.

*Case No. 8:* The defendant in this case was convicted of arson and sentenced to ten years imprisonment. In addition to two arguments that were resolved on the merits, the defendant asserted (1) that he had been improperly denied the right to recall a witness to rebut a statement made by the prosecutor; and (2) that improper argument had been made by the prosecutor in summation. The Supreme Court rejected these two arguments because of a failure of the defendant to raise the issues at trial.

*Case No. 9:* In this case the defendant, who had been convicted of burglary, asserted only one ground for reversal of the conviction. He argued that the trial court had improperly refused to permit him to show that the principal prosecution witness had been intimidated by threat of a perjury prosecution before giving testimony. The Supreme Court did not reach the merits of the issue because the defendant's lawyer failed to place in the record the testimony excluded by the trial judge's action.

*Case No. 10:* After being convicted of burglary and theft, the defendant in this case appealed to the Supreme Court on the exclusive ground that the jury had not been told a defendant cannot be convicted solely on the basis of accomplice testimony. The Court ruled that "any error relating to the instructions was not properly preserved for appellate review."

*Case No. 11:* The defendant in this case was convicted of burglary and sentenced to five years imprisonment. In one of his arguments on appeal he asserted that a confession had been taken from him in the absence of "Miranda" warnings; the Supreme Court would not consider the argument because no objection had been made at trial to the introduction of the confession. In a second argument the defendant attempted to challenge the adequacy of the instructions given the jury; the Court did not consider the merits of this claim since no objection had been made at trial to the instructions. The defendant made only one other argument on this appeal; it was decided against him on the merits.

Each of these cases, as well as the two described earlier, completed the journey through our judicial system within the last year. Consequently, the level of performance and competency which they reflect is not diluted significantly by a factor of time. In other words, the impression which I have attempted to describe was not generated by an evaluation of cases that had been mishandled or mismanaged over a period of five or ten years. Every failure and shortcoming described here surfaced in appellate opinions that were decided in the brief period of approximately one year.<sup>9</sup>

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<sup>9</sup> Before leaving this subject it should be mentioned that the appellate opinions do not reflect inadequacy in the conduct of trials only by those who engage in the defense of criminal cases. Since the prosecution rarely finds it necessary to take the initiative on an appeal, failures of a prosecutor in processing a case are more difficult to detect in a review of appellate court opinions. Nevertheless, some do surface in the cases, as indicated by the following statements, extracted from opinions written by Kentucky appellate courts during the past year:

One of the finest offices the public can give to a member of the legal profession in this state is that of Commonwealth's Attorney. Its very status becomes a mantle of power and respect to the wearer. Though few are apt to wear it lightly, some forget, or apparently never learn, to wear it humbly. No one except for the judge himself is under a stricter obligation to see that every defendant receives a fair trial, a trial in accordance with the law, which means the law as laid down by the duly constituted authorities, and not as the prosecuting attorney may think it ought to be.

We consider this to be an inexcusable example of abuse by a public prosecutor. Officially, publicly, and as a word of caution to other similar officers, we disapprove of and condemn it.

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Since the error discussed above renders it necessary to reverse this case for a new trial, we feel compelled to advise by this opinion that we consider the conduct and closing argument of the Commonwealth's Attorney to have been highly improper. . . . The transcript of evidence is replete with objectionable statements and the injection of false issues by the prosecutor and several of the Commonwealth's witnesses, and it is plainly evident from this record that the prosecutor was attempting to induce the jury to believe the worse of the appellant by making her appear to be involved in the trafficking of a controlled substance. The means employed in this effort included introducing into evidence the drug paraphernalia seized during the search, displaying it prominently on the lip of the jury box, and repeatedly making reference to these articles during the presentation of evidence. . . . We soundly condemned this variety of prosecutorial misconduct in *Coates v. Commonwealth*, when we indicated that such action deprived the appellant therein of the fair jury trial to which he was entitled. . . .

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During the course of the trial the Commonwealth was permitted over objection to elicit from a police detective, and also from the defendant himself on cross-examination, that . . . after he had received the Miranda warn-

## CONCLUSION

## 1.

In *Sykes* Justice Brennan concluded his dissenting opinion with the observation that in this country we have traditionally resisted "any realistic inquiry into the competency of trial counsel."<sup>10</sup> Instead we have indulged what he characterized as a "comfortable fiction"<sup>11</sup> that all lawyers are competent to represent the fundamental rights of individuals. In this writing, without intending to assess fault on any individual or group, I have attempted to cast some doubt on the wisdom of this assumption. To accomplish this objective I have relied not on broad generalizations about the competency of lawyers or on personal opinion, but instead on documented events that have transpired recently in the courts of this state. Most all of the discussion to this point has consisted of materials extracted directly from opinions of the two Kentucky appellate courts. These materials have been condensed, arranged, and used to describe an impression, but a conscious effort has been made to minimize evaluative judgments about them. In this conclusion I intend to depart very little from this approach and to resist the temptation to offer expansive explanations of the problem. The brief comments that follow are offered for the purpose of placing some additional emphasis on the underlying theme of my presentation, namely, that we may have a problem about which we ought to get seriously concerned.

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ings [he] did not come forth with the explanation or story upon which he ultimately relied for his defense. . . . This was the most egregious error committed in the trial, and, as in the instance of the other two errors we have already mentioned, it was compounded by the prosecuting attorney in his closing remarks to the jury. Rarely does such a proliferation of indefensible blundering crop out in a single trial.

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The conduct of the prosecutor in inquiring as to the appellant's prior felony conviction appears to have been both calculated and inexcusable. The American Bar Association's Code of Professional Responsibility, adopted by the Kentucky Supreme Court (RCA 3.130), provides that a lawyer shall not "intentionally or habitually violate any established rule of procedure or evidence."

It is unthinkable that this conduct would recur upon retrial but if it does, the trial court, upon appropriate motion, should set aside the swearing of the jury and discipline the offender accordingly.

<sup>10</sup> *Wainwright v. Sykes*, 433 U.S. at 117 (dissenting opinion).

<sup>11</sup> *Id.* at 118.

## 2.

In the opinions of the appellate courts, I find designated as counsel of record the names of lawyers who have been engaged in the practice of law barely long enough to process a case from trial through appeal. I know of a recent instance in which a young lawyer was appointed as defense counsel in a difficult, notorious and major case, although he was without experience in the trial of any cases, criminal or otherwise. I know of a public defender district in which a conscientious effort was made to employ a defender who had had some prior legal experience. Upon failure of that effort, arrangements were made to fill the position prospectively with a young man who was yet to graduate from law school. Incidents such as these, as experienced lawyers and judges well know, are neither unique nor novel. For a long time a large part of the legal representation provided criminal defendants has fallen to the youngest, most inexperienced members of the profession.<sup>12</sup>

An explanation for this occurrence is not difficult to find. In 1977 the Kentucky Bar Association conducted a survey of its membership that was addressed in large measure to economic issues. A portion of the data gathered by that survey indicated the median income of lawyers according to the fields of law in which they practice. The median income of practitioners in twenty-three fields of practice ranged from a low of \$16,000 to a high of \$62,500; the "median" of these twenty-three medians was \$28,000. Lawyers who designated criminal law as their field reported a median income of \$16,000, the lowest compensation of all lawyers who claimed in the survey to have a "field of practice."<sup>13</sup> Until this economic circumstance is altered, which is certainly not imminent, the defense of those charged with crime will continue, to a substantial if not major degree, to fall to lawyers with relatively little experience in the processing of

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<sup>12</sup> Fifteen years ago, in this state, I was admitted to practice law on a Friday morning. On the following Monday I was assigned the task of defending an indigent accused in a robbery case. Opposing counsel in the case was a lawyer with at least 15 years experience in the trial of cases. Many times since the day of that assignment, I have wondered whether the guilty plea entered by the accused was a consequence of wisdom in my encouragement of the plea, a consequence of my fear of the assignment, or a consequence of a lack of competency to process the case in any other fashion.

<sup>13</sup> Kentucky Bar Association, *1977 Economic and Opinion Survey*, 41 KY. BENCH & BAR i, viii (1977).

legal controversy. Consequently, the overall level of performance in the satisfaction of this responsibility will probably correlate significantly with the professional skills that lawyers possess when they emerge from law school to begin law practice.

The possible existence of this correlation, all other relevant considerations aside, is a reason for concern. Prominent jurists from all levels of the judiciary, with increasing frequency, state publicly that more than half the lawyers who appear before them lack the capacity to manage litigation. For many years the practicing bar has made the charge that the law schools of this country teach no one how to practice law. It is virtually inconceivable that these allegations are totally lacking in substance. The fundamental structure of legal education, even though it has changed slightly in recent years, would itself lend support to the second conclusion. In most law schools the principal focus is still largely on two objectives—teaching the students an analytical technique (i.e., “how to think like lawyers are supposed to think”) and exposing them to various bodies of substantive legal doctrine. In the course of accomplishing these objectives (and perhaps as an additional goal), the students are familiarized to some extent with the environments that surround institutions which create and implement the law. But hardly anyone connected with legal education would seriously dispute the claim that very little emphasis has been placed on the practical skills involved in the management of important litigation. Despite recent efforts to develop a clinical component of the law school curriculum, the average law student still receives little, if any, instruction in investigative techniques, fact assimilation and evaluation, the structuring of alternative strategies, advocacy before decision-making bodies, and related skills essential to the defense of a criminal case. Conditions in legal education have not changed significantly since 1972, when a report prepared for the Carnegie Commission on Higher Education concluded that “[t]he main emphasis has been to teach various qualities of mind . . . that provide a sound foundation upon which the student can build his professional skills *when* he begins practice.”<sup>14</sup> If this conclusion

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<sup>14</sup> H. PACKER & T. EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 43 (1972) (emphasis added).



does not answer the following question, no doubt is left about the need to have it honestly addressed: Does the law graduate of today emerge from his legal education prepared to assume responsibility for the most significant litigation that occurs in the judicial system?

3.

A brief word of caution about the nature of the problem under discussion might be beneficial. A less-than-thoughtful consideration of the cases described in this writing could lead to a conclusion that the lawyers who handled them simply lacked the ability to preserve errors for appellate review. I doubt seriously that the problem manifested by the cases is so simple. When a lawyer fails in the trial of a case to object to instructions given the jury, it is possible that he lacks knowledge of the obligation to do so under Kentucky Rule of Criminal Procedure 9.54. And a failure to specify reasons for an objection or a motion could certainly indicate an ignorance of the requirement to specify. On the other hand, in each of these instances the failure to "preserve error for review" could indicate a more fundamental lack of knowledge on the part of the lawyer. While a failure to object to incompetent evidence might indicate an unawareness of the obligation to object, it seems more probable that the failure means that the lawyer lacks a workable knowledge of evidence law. Similarly, a failure to move for a directed verdict because of the insufficiency of evidence, though it might reflect an ignorance of procedural requirements, could just as well mean that the lawyer's knowledge of criminal law is such that he is unable to detect an insufficiency in the prosecution's case.

With these observations I intend only to suggest that the problem under discussion might be more fundamental than appears on the surface and that its remedy might be more difficult than would be initially anticipated. It seems unlikely that the manner in which criminal cases are being processed in this state could be improved significantly by insisting that lawyers who defend such cases learn the twenty or twenty-five black letter rules on preserving errors for review.

## 4.

In personal conversations with lawyers who engage in the practice of criminal cases I detect an understandable reluctance to acknowledge the possibility that a problem such as described here might exist. Frequently, this reluctance manifests itself in the form of a claim that the appellate courts are too quick to reach for what is characterized as the "preservation excuse." Is there merit to this claim or is this a rationalization for inadequacy in the conduct of criminal trials? On this question I can offer only some preliminary thoughts, for I have made no attempt to assess completely the validity of the claim.

Without a doubt the rules that have been designed to govern the conduct of trials and appeals are regarded by the present Supreme Court of Kentucky as especially important. No one who reads with regularity the opinions of the Court can be left with a different impression. The following statement conveys a message that can be found in an almost endless stream of opinions of recent years:

There is a simple and easy procedural avenue for the enforcement and protection of every right and principle of substantive law at an appropriate time and point during the course of any litigation, civil or criminal. That is not to say that form may be exalted over substance, because procedural requirements generally do not exist for the mere sake of form and style. They are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or denigrated. Without them every trial would end in a shipwreck.<sup>15</sup>

Not only has the Supreme Court sounded express warnings such as this one, it has demonstrated through its actions (time after time) an intention to enforce procedural requirements designed to guarantee an orderly resolution of controversy. Simultaneously, the Court has demonstrated a persistent reluctance to salvage on appeal cases that have been wrecked at trial.

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<sup>15</sup> *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky. 1977).

If this attitude and action is the basis for the claim that the appellate courts too quickly reach for the "preservation issue" then the claim is clearly meritorious. On the other hand, if the basis for it is that the courts are imposing burdensome and unwarranted requirements for the preservation of errors, the decisions as a whole do not seem to support the claim. As difficult as it may be to acknowledge, they seem instead to point to a need to consider another possibility—whether our performance in the processing of criminal controversies, and perhaps even our competence for the task, is less than should be expected in a matter of such importance.